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No. 02-215

In the Supreme Court of the United States

PACIFICARE HEALTH SYSTEMS, INC., *et al.*,

Petitioners,

v.

JEFFREY BOOK, D.O., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States (the Chamber) is the world's largest business federation representing an underlying membership of more than 3,000,000 businesses and organizations of every size. Chamber members operate in every sector of the economy and transact business throughout the United States, as well as in a large number of countries around the world. A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber has filed *amicus curiae* briefs in numerous cases that have raised issues of vital concern to the nation's business community.

Many of the Chamber's members have adopted as standard features of their business contracts provisions that mandate the arbitration of disputes arising from those agreements. Many arbitration provisions preclude the award of punitive damages by the arbitrator. The enforceability of these arbitration agreements, including their limits on punitive damages, is essential to ensuring that the parties receive the benefit of the dispute resolution mechanism for which they bargained. The many businesses that routinely employ arbitration to resolve their disputes also have a strong interest in ensuring that they remain free to structure future arbitra-

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[1] The parties have consented to the filing of this brief; the written consents have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amicus curiae*, its members, and its counsel made a monetary contribution to the preparation and submission of this brief.

tion agreements according to their wishes and the wishes of their contracting partners.

The Eleventh Circuit's decision that arbitration agreements that preclude the award of punitive damages can be avoided by filing a RICO claim (which would appear to apply equally to cases alleging any federal or state statutory cause of action that allows for punitive or multiple damages) will weaken many existing arbitration agreements and limit the ability of businesses freely to negotiate future arbitration agreements. Accordingly, the Chamber's members have a strong interest in encouraging this Court to reverse the decision below.

INTRODUCTION AND SUMMARY OF ARGUMENT

Contractual provisions mandating the arbitration of disputes between the parties have become increasingly common. Corporations and individuals alike have recognized that arbitration has many advantages over traditional litigation. Chief among these advantages is the flexibility to tailor dispute resolution procedures and remedies to the nature of the contract and the circumstances of the parties. Recognizing that this is one of the principal benefits of arbitration, and consistent with the general federal policy favoring arbitration, this Court has repeatedly stated that the contracting parties may structure their arbitration agreements as they see fit. Following this Court's lead, the vast majority of federal circuits that have addressed the issue have held that parties may enter into mandatory arbitration agreements while waiving their right to obtain punitive damages in the arbitration.

In the decision below, the Eleventh Circuit ruled that an arbitration agreement that waives punitive damages cannot be enforced when one party alleges that the other violated the federal RICO statute. The decision imposes a categorical rule that contracting parties who agree to submit their disputes to an arbitrator ***cannot*** also agree to forgo treble dam-

ages under RICO. Moreover, because the Eleventh Circuit's decision was not tethered to any particular Congressional interest in enforcing RICO, the court's reasoning would seem to apply to any claim under a federal or state statute that permits the recovery of multiple or punitive damages.

Unless it is reversed, therefore, the ruling will mean that parties that have already entered into arbitration agreements that waive punitive damages will be able to bypass arbitration altogether if they can frame a dispute as a RICO claim or another statutory claim that provides for punitive or multiple damages. To avoid this gaping loophole, moreover, future arbitration agreements that generally waive punitive damages will have to expressly exclude from the waiver the many federal and state statutory causes of action that provide for punitive or multiple damages. This state of affairs will strongly encourage future claimants to pursue RICO claims (and other federal and state statutory claims) in addition to, or instead of, more straightforward common law claims as to which punitive damages have been waived. To the extent that businesses are not willing to entrust an arbitrator with a multiple-damages or punitive damages remedy – but do not wish to encourage RICO claims (or claims under other statutory regimes) by excluding ***only*** those causes of action from arbitration – the rule will simply discourage the formation of agreements to arbitrate.

The Eleventh Circuit's decision is thus inconsistent with the strong federal policy preference for arbitration. It fails to give sufficient weight to the interest of the contracting parties in freely deciding, ***before*** they are embroiled in a dispute, what remedies they wish to make available to the arbitrator. And, by giving an unjustified preference to RICO's treble-damages provision, it will encourage frivolous claims under this statute. Accordingly, the Chamber urges the Court to reverse the Eleventh Circuit's decision.

ARGUMENT

A. There Are Good Reasons For Both Parties To A Contract To Agree To Mandatory Arbitration Of Their Disputes

Arbitration is a process in which "one or more third-party neutrals review facts and arguments from both sides during an adversarial hearing, apply legal standards, and render a decision on the merits." 3 BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 42.4(c)(2) (Robert L. Haig ed. 1998). This alternative to traditional litigation for resolving disputes has long received the law's endorsement. The Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, enacted in 1925, established "a liberal federal policy favoring arbitration agreements" in which "any doubts concerning the scope of arbitrable issues [is] resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). To that end, the FAA requires "courts to enforce arbitration agreements into which parties had entered and to place such agreements upon the same footing as other contracts." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 271 (1995) (internal quotation marks and citations omitted).

There are many reasons why parties to a contract might agree to arbitrate disputes arising from their business relationship rather than proceed to court. Arbitration "'is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; [and] it is often more flexible in regard to scheduling of times and places of hearing and discovery devices.'" *Allied-Bruce*, 513 U.S. at 280 (quoting H.R. Rep. No. 542, 97th Cong., 2d Sess. 13 (1982)). These advantages are particularly "helpful to individuals * * * who need a less expensive alternative to litigation." *Ibid.* In fact, a recent study that compared employment claims filed with the

American Arbitration Association with similar claims filed in federal court determined that, on average, the cases that went to arbitration were resolved in half the time that it took to resolve cases that were litigated in court. See Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 55 (1998). Indeed, Congress recently reaffirmed its view that arbitration helps avoid the "delays, expense, uncertainties, loss of control, adverse publicity, and animosities that frequently accompany litigation." Y2K Act of 1999, Pub. L. No. 106-37 § 2(a)(3)(B)(iv), 113 Stat. 186.

Arbitration agreements possess the particular benefit of allowing the contracting parties to select the dispute resolution procedures and remedies that are most appropriate to their circumstances, including the nature of the contract and the types of disputes likely to arise under it. This Court has recognized that "[a]rbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit." *Volt Info. Scis., Inc.* v. *Board of Trustees of Leland Stanford, Jr. Univ.*, 489 U.S. 468, 479 (1989); see also *ibid.* (the parties may "specify by contract the rules under which * * * arbitration may be conducted").

There is little, if any, down side to arbitration to offset its numerous advantages. Importantly, there is no evidence that the additional speed and flexibility of arbitration is achieved at the cost of procedural fairness associated with traditional litigation. This Court has "decline[d] to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634 (1985). Nor does arbitration disproportionately benefit large corporate entities at the expense of individuals. To the contrary: a recent study of the results in arbitration and litigation for similar cases determined that individuals are four times

more likely to prevail in arbitration than in litigation. See Maltby, 30 COLUM. HUM. RTS. L. REV. at 46-48. And, win or lose, the vast majority of those participating in arbitration are satisfied with the process. A study of securities arbitration, for example, indicated that over 90 percent of the participants believed that their cases were handled fairly. See Gary Tidwell, *et al.*, *Party Evaluation of Arbitrators: An Analysis of Data Collected from NASD Regulation Arbitrations*, at 25 (Aug. 5, 1999) (presented to the National Meeting of the Academy of Legal Studies in Business).

B. It Is Reasonable For Parties To An Arbitration Agreement To Choose To Waive Claims For Punitive Damages

In interpreting a contract, courts look to the contracting parties' intentions, because the parties are the best judge of their own self-interest. See Richard A. Posner, ECONOMIC ANALYSIS OF LAW 105 (5th ed. 1998). A clause in a contract that specifies that all disputes related to the contract are to be arbitrated, and provides that the arbitrator may not award punitive damages, is no less a product of rational self-interest.

There is good reason for parties who wish to submit their disputes to arbitration nonetheless to be wary of allowing an arbitrator to award punitive damages. Arbitration agreements generally provide for limited discovery and simplified procedures. Indeed,

> it is often a judgment that streamlined proceedings and expeditious results will best serve their needs that causes parties to agree to arbitrate their disputes; it is typically a desire to keep the effort and expense required to resolve a dispute within manageable bounds that prompts them mutually to forgo access to judicial remedies.

Mitsubishi Motors Corp., 473 U.S. at 633.

But the parties to a contract may be less comfortable giving up the panoply of procedural rights associated with full-blown litigation if the wild card of punitive damages is introduced. Nothing prevents an arbitrator from imposing a punitive sanction as large as one that a jury might impose. Neil Vidmar, *Are Juries Competent to Decide Liability in Tort Cases Involving Scientific/Medical Issues? Some Data from Medical Malpractice*, 43 EMORY L.J. 885, 907 (1994) (data does not support the hypothesis that juries award larger punitive awards than arbitrators). Moreover, "[i]f an arbitrator makes a mistake of law, or even an egregious error interpreting a contract, his decision is not subject to judicial review." Jordan L. Resnick, Note, *Beyond Mastrobuono: A Practioners' Guide to Arbitration, Employment Disputes, Punitive Damages, and the Implications of the Civil Rights Act of 1991*, 23 HOFSTRA L. REV. 913, 970 (1995). Only if the arbitrator exceeds his authority or commits misconduct can an award be challenged in court. 3 BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 42.4(c)(2). With such limited appellate review of an arbitrator's award, the contracting parties may well decide that the risk of a punitive award being assessed against them outweighs the possible benefit of receiving such an award, particularly if they do not know in advance whose ox will be gored.

Furthermore, *ex ante*, the "cost" of precluding punitive damages for all disputes related to the contract is likely – and accurately – to be perceived as minimal. As a general rule, punitive damages may not be awarded for breach of contract. See John J. Kircher & Christine M. Wiseman, PUNITIVE DAMAGES: LAW AND PRACTICE § 5:07 (2d ed. 2000); RESTATEMENT (SECOND) OF CONTRACTS § 355 (1979). Accordingly, it is quite reasonable for self-interested parties who wish to resolve any future business disputes quickly and efficiently to agree to an arbitration provision that includes a punitive damages waiver.

It also is rational for the parties to include statutory claims for multiple damages in any waiver of punitive damages.[2] First, if the compensatory damages are sufficiently high, treble damages may constitute very significant punishment; a party may reasonably be reluctant to risk such a punishment in an arbitral forum that provides only limited rights of appeal. Second, preserving statutory claims for multiple damages while waiving other such claims may create perverse incentives: such an agreement will inevitably encourage resort to the "privileged" statutory claims, increasing the cost and complexity of the arbitration proceedings. Indeed, it would be ironic if, by precluding the award in arbitration of punitive damages for state-law fraud claims, a business ended up encouraging its contractual partners to raise RICO, antitrust, or Lanham Act claims against it in order to escape the impact of that waiver.

Given the strong federal policy favoring arbitration, and this Court's mandate that arbitration agreements be interpreted in the same way as other contracts, it is not surprising that the overwhelming majority of federal appeals courts that have addressed the issue have held that "the parties can stipulate to whatever procedures they want to govern the arbitration of their disputes * * * [and] surely can stipulate that punitive damages will not be awarded." *Baravati* v. *Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994). See, *e.g.*, *Inv. Partners, L.P.* v. *Glamour Shots Licensing, Inc.*, 298 F.3d 314, 318 (5th Cir. 2002); *Long* v. *Silver*, 248 F.3d

[2] The Chamber takes no position on whether the parties in this case, in entering into the arbitration clauses at issue, intended to waive federal statutory claims for multiple damages. For purposes of this *amicus* brief, however, we assume that the Court will conclude that at least one of those arbitration clauses waives claims for treble damages under RICO and therefore will reach the question of whether such a waiver renders the agreement to arbitrate unenforceable.

309, 319 (4th Cir.), cert. denied, 122 S. Ct. 213 (2001); *Bowen* v. *Amoco Pipeline Co.*, 254 F.3d 925, 939-940 (10th Cir. 2001); *Davis* v. *Prudential Sec., Inc.*, 59 F.3d 1186, 1189 (11th Cir. 1995); *Raytheon Co.* v. *Automated Bus. Sys., Inc.*, 882 F.2d 6, 12 (1st Cir. 1989); *Surman* v. *Merrill Lynch, Pierce, Fenner & Smith*, 733 F.2d 59, 63 (8th Cir. 1984).

Indeed, even outside the context of arbitration, this Court has upheld the right of the parties to a contract to determine the rights and remedies that will govern their relationship. In *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972), for example, this Court upheld the enforceability of a contractual forum selection clause that affected the parties' substantive rights, concluding that the clause "should control absent a strong showing that it should be set aside." *Id.* at 15. Specifically, a party seeking to avoid a forum selection clause must "clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." *Ibid.* Of particular note, the Court observed that "it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations." *Id.* at 14.

The lower courts also have overwhelmingly enforced contractual forum selection and choice-of-law provisions, even when by choosing the law of a particular jurisdiction the parties give up rights that otherwise would be available to them – including the right to seek punitive damages. See, *e.g.*, *Moses* v. *Bus. Card Express, Inc.*, 929 F.2d 1131, 1139 (6th Cir. 1991) (plaintiffs "cite no case in which it has been held that a state's dominating public interest is violated by requiring its citizens and residents to try a lawsuit in another jurisdiction with a different rule on punitive damages where the parties have agreed that the other state's substantive law is controlling").

Accordingly, the Eleventh Circuit's decision that RICO treble damages may not be waived represents a marked departure from the general rule that parties to contracts may decide how their disputes will be resolved. As discussed below, this departure is contrary to the federal policy favoring arbitration and is not justified by the purposes of the RICO statute.

C. The Eleventh Circuit's Decision Interferes With The Freedom Of The Parties To Negotiate Appropriate And Beneficial Arbitration Agreements And Does Not Advance Any Countervailing Federal Policy Concerning The Enforcement Of RICO

Unless it is reversed, the Eleventh Circuit's holding that parties to an arbitration agreement may not agree to waive all claims to multiple damages under RICO will have wide-ranging detrimental effects. While the costs of the decision are self-evident, we can discern no way in which the decision will advance the federal interests represented by the RICO statute.

First, the Eleventh Circuit's decision will create a gaping loophole in many existing arbitration agreements. Consistent with the broad judicial acceptance of private waivers of punitive damages, many businesses now include punitive damages waivers in their standard arbitration agreements. If the Eleventh Circuit's decision is affirmed, an aggrieved party seeking to avoid arbitration and escape its commitment to seek only compensatory damages will be given the incentive to cobble together a RICO claim. Experience has demonstrated that "litigants, lured by the prospect of treble damages and attorney's fees, have a strong incentive to invoke RICO's provisions." *Sedima, S.P.R.L.* v. *Imrex Co., Inc.*, 473 U.S. 479, 504 (1985); see also Hon. William H. Rehnquist, *Remarks of the Chief Justice*, 21 ST. MARY'S L.J. 5, 10 (1989) (noting large number of civil RICO cases filling the federal docket); Hon. Jed. S. Rakoff & Howard W. Goldstein, RICO:

CIVIL AND CRIMINAL LAW AND STRATEGY § 2.03, at 2-33 (1999) (referring to "substantial" rate of RICO filings, continuing at an average of eighty to ninety per month since 1986). To the extent that such claims have any colorable merit, there will be a shift away from arbitration to litigation. To the extent that such claims are frivolous, both judicial resources and the resources of defendants will be expended in weeding them out. This will substantially negate the efficiencies that the parties expected to gain when they entered into their arbitration agreements in the first place.

Second, the Eleventh Circuit's exception will create a disincentive for parties to enter into arbitration agreements at all. If punitive damages generally are waivable but RICO treble damages are not, the parties negotiating an arbitration agreement will realize that including a punitive damages waiver will lead to creative pleading by the aggrieved party to invoke RICO. For the reasons discussed above, many parties will not agree to arbitrate their disputes ***at all*** without a broad waiver of punitive damages. Because the arbitration agreement resulting from this dilemma may be no better than no agreement at all, parties are likely to opt for the latter.

On the other side of the scale, one searches in vain for a compelling federal interest that would justify preventing parties to an arbitration agreement from waiving a claim for multiple damages under RICO. First, Congress left the RICO treble-damages action in the control of private parties. Like the private antitrust claims that the court discussed in *Mitsubishi Motors*, "no citizen is under an obligation to bring [a RICO] suit," and "the private [RICO] plaintiff needs no executive or judicial approval before settling one." 473 U.S. at 636. Accordingly, no congressional purpose should be offended if a private citizen makes the judgment, *ex ante*, that its interests will be served by eschewing a RICO treble-damages action when arbitrating claims against its business associate. And, of course, the contracting parties will always remain free to enter arbitration agreements that expressly

permit the award of treble damages under RICO or that exempt RICO claims altogether from arbitration. See *id.* at 628 ("Nothing * * * prevents a party from excluding statutory claims from the scope of an agreement to arbitrate.").

Second, RICO has so departed from its original conception that a voluntary prospective waiver of treble damages against a contracting partner can scarcely be said to interfere with the intentions of the drafters. In *Shearson/American Express Inc.* v. *McMahon*, 482 U.S. 220 (1987), this Court noted that RICO's drafters, like the drafters of the antitrust statutes' treble-damages provision, "likewise sought to provide vigorous incentives for plaintiffs to pursue RICO claims that would advance society's fight against organized crime." *Id.* at 241; see also *Rotella* v. *Wood*, 528 U.S. 549, 558 (2000) ("[t]he provision for treble damages is * * * justified by the expected benefit of suppressing racketeering activity"). "[I]n its private civil version," however, "RICO [has evolved] into something quite different from the original conception of its enactors." *Sedima*, 473 U.S. at 500. The vast majority of civil actions under RICO are brought against legitimate businesses, not mobsters. As this Court said in *Shearson/American Express*, "[t]he special incentives necessary to encourage civil enforcement actions against organized crime do not support nonarbitrability of run-of-the-mill civil RICO claims brought against legitimate enterprises." 482 U.S. at 242. This observation compels the conclusion that the award of RICO treble damages is not necessary to vindicate the federal interest in enforcement of the RICO statute – especially when the case involves claims arising from a dispute between the parties to a contract that includes an arbitration clause.

Even if, contrary to all reasonable expectations, a widespread RICO conspiracy emerged that affected only individuals or entities who had signed arbitration agreements that barred suits against the wrongdoer for treble damages, the federal interest in the enforcement of RICO still would not

outweigh the importance of enforcing those arbitration clauses. If a strong message needed to be sent to particularly egregious wrongdoers, the government would have at its disposal the option of criminal prosecution, either under the RICO statute or under the laws criminalizing the predicate acts. Allowing a party to bring a civil suit in violation of its arbitration agreement instead — as the Eleventh Circuit did in this case — is an example of the remedy being worse than the disease.

D. The Eleventh Circuit's Decision Has No Logical Stopping Point And Creates An Exception To The General Rule Favoring Arbitrability That Threatens To Swallow The Rule

As we discussed above, the Eleventh Circuit's decision undermines the right of contracting parties to set the terms of their arbitration agreements and the well-settled federal policy favoring arbitration without advancing any countervailing federal interest in litigating civil RICO claims. For these reasons alone, the decision warrants reversal by this Court. Even more troubling than the outcome of this particular case, however, is the wide-ranging applicability of the Eleventh Circuit's holding that threatens the future arbitrability of ***all*** statutory claims that provide for punitive or multiple damages.

The Eleventh Circuit adopted the reasoning of the district court (see Pet. App. 4a), which, in turn, based its order upon a prior Eleventh Circuit decision holding that a clause prohibiting extra-contractual damages rendered an agreement to arbitrate unenforceable ***in a Title VII action***. *Id.* at 30a-31a (citing *Paladino* v. *Avnet Computer Techs., Inc.*, 134 F.3d 1054 (11th Cir. 1998)). Noticeably absent from either court's opinion is any discussion of federal policy precluding waiver of the RICO treble-damages remedy. This omission, combined with the lower courts' reliance on a Title VII case, clearly indicates that the exception carved out by the district

court and countenanced by the Eleventh Circuit is not narrowly limited to RICO claims.

Without any language cabining its holding, the Eleventh Circuit's decision has no logical stopping point. There is no good reason why the district court's conclusion (incorporated by reference by the Eleventh Circuit) that "the limitation on punitive or exemplary damages serves as a limitation on the statutory claims that may be adjudicated before an arbitrator" (Pet. App. 31a) cannot also render non-arbitrable claims brought under a host of federal statutes that provide for treble damages, such as the Clayton Act and the Lanham Act, or punitive damages, such as Title VII and the ADA. For that matter, there is no good reason why this holding would not also preclude arbitration of claims brought under state deceptive trade and consumer fraud statutes that provide for multiple damages or punitive damages. In light of how often these types of claims are raised in civil litigation (see generally Anthony Paul Dunbar, *Consumer Protection: The Practical Effectiveness of State Deceptive Trade Practices Legislation*, 59 TUL. L. REV. 427 (1984)), there is a grave risk that the Eleventh Circuit's exception to the general rule favoring arbitration, if left uncorrected, will eventually swallow that rule. That outcome would be wholly inconsistent with decades of pronouncements by this Court that arbitration is to be encouraged, not thwarted.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted.

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